No. 14-1382

In The
Supreme Court of the United States

AMERICOLD REALTY TRUST,

Petitioner,

v.

CONAGRA FOODS, INC.,
and SWIFT-ECKRICH, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

In a suit brought against an artificial non-corporate entity, may diversity jurisdiction be measured from a board of managers nominally called trustees or must diversity jurisdiction be measured by aggregating the citizenship of all the entity's members, thus making the artificial entity a citizen of every state in which its members are citizens?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Respondents refer herein to "Petitioners," as Americold Realty Trust and Americold Logistics, LLC jointly filed the *Brief for the Petitioners* before Americold Logistics, LLC was dismissed.

Respondent ConAgra Foods, Inc. and Swift-Eckrich, Inc., pursuant to Rule 29.6, incorporate by reference their corporate disclosure from *Respondents ConAgra Foods, Inc.'s and Swift-Eckrich, Inc.'s Brief in Response to Petition for Writ of Certiorari*.

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STATEMENT OF THE CASE

Lao Tzu said, "Do the difficult things while they are easy and do the great things while they are small. A journey of a thousand miles must begin with a single step." ConAgra, Inc.'s ("ConAgra") and Swift-Eckrich, Inc.'s ("Swift") first step in their thousand-mile journey pursuing over $7 million from Americold Corporation's[1] $25 million insurance policy began in 1992. Americold undeniably owed ConAgra and Swift $7.38 million plus interest and consented to a judgment reflecting that obligation. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 261 Kan. 806, 809, 934 P.2d 65, 70 (1997) (*Americold I*); C.A. App. at A279.

Indeed, the Kansas Supreme Court ruled that Americold's $25 million insurance policy covers the precise harm suffered by ConAgra and Swift. *Id.* at 824-26, 934 P.2d at 78-79. In their pursuit of the agreed-to debt and the now-undisputed insurance coverage, ConAgra and Swift have travelled deep into a tangled legal jungle where Americold's insurers have fled, appearing five times before state and federal appellate tribunals. ConAgra and Swift now enter this Court for the sixth appellate hearing to decide whether measuring diversity jurisdiction for

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[1] Americold Realty Trust is the legal successor to Americold Corporation who owned and operated the facility in 1991. Hereafter, Americold Realty Trust, and the predecessor entity Americold Corporation, shall be referred to as "Americold" in that their interests are aligned.

an unincorporated artificial entity must be determined by the titular board of trustees acting as managers, or by the member-shareholders who actually own the artificial entity's beneficial interests.

This journey began on December 28, 1991, when fire raged spreading toxic smoke throughout Americold's 170-acre former underground rock quarry which had been converted to a warehouse. Authorities embargoed the contaminated food, and ConAgra and Swift sued for smoke damages. *Id.* at 812, 934 P.2d at 71. Notably, Americold's lawyers knew that Americold had "serious defense problems," concluding Americold faced disaster at trial. *Id.* at 814, 838, 934 P.2d at 73, 86.

Six weeks before trial, Northwestern Pacific Indemnity Company ("NPIC") first alerted Americold that NPIC claimed there was no coverage asserting a "clean smoke" – "dirty smoke" defense. That is, NPIC insisted its policy excluded coverage for smoke containing toxins, so-called "dirty smoke," but covered only so-called "clean smoke" without toxins, even though NPIC failed to explain how any fire produced "clean smoke." *Id.* at 825, 934 P.2d at 78. In other words, hostile fires don't emit "clean smoke," and Americold indignantly claimed the defense was specious demanding coverage. *Id.* at 818, 934 P.2d at 75. But NPIC refused to offer any of its $25 million policy limits to settle, hunkering down with its "clean smoke" – "dirty smoke" defense.

On March 10, 1994, the Tenant Plaintiffs[2] and Americold settled (the "Agreement"), whereby Americold consented to judgments for the Tenant Plaintiffs who agreed to only execute on Americold's insurance contracts. *See* C.A. App. at A246. So, Americold assigned claims against NPIC and TIG Insurance Company ("TIG") and also agreed to cooperate by signing additional documents to effectuate the Agreement's purpose or collect the Consent Judgments. *See* C.A. App. at A246, A262. In September 1994, the Tenant Plaintiffs garnished NPIC and TIG (the "Garnishment Action"), but both insisted their policies excluded coverage. *See* C.A. App. at A247. The trial judge granted summary judgment against both, finding coverage and awarding $58,670,754 collectively to the Tenant Plaintiffs. *Americold I*, 261 Kan. at 820, 934 P.2d at 76. TIG then paid its $15 million policy limits, but NPIC appealed.

The *Americold I* court saw through NPIC's "clean smoke" – "dirty smoke" defense and flatly rejected it, finding NPIC breached the insurance contract but nevertheless remanded the case directing that the trial judge answer the following: (1) were the Consent Judgments reasonable, and (2) did NPIC deny coverage in bad faith. *Id.* at 810, 853, 934 P.2d at 71, 93-94. *Americold I* left undisputed NPIC's liability for its

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[2] Tenant Plaintiffs are those plaintiffs suing Americold under lease arrangements, not other plaintiffs who sued on bailment claims.

$25 million policy limits for smoke damage. *Id.* at 853, 934 P.2d at 94.

After the Garnishment Action remand, Judge Sieve heard a ten-week trial deciding the settlement's reasonableness and NPIC's bad faith. Under the Agreement's cooperation provisions, Americold executives testified concerning both issues. *See* C.A. App. at A139-A238. On November 15, 2005, the trial's last day, NPIC moved to dismiss claiming for the first time that the Tenant Plaintiffs didn't file new executions during the Garnishment Action's pendency leaving the Consent Judgments dormant. *See* C.A. App. at A247; J.A. at 31. Judge Sieve, who had to sign the executions NPIC now claimed were necessary to sustain the Consent Judgments, concluded he lacked such authority until he fulfilled the *Americold I* mandate by determining the Consent Judgments' reasonableness and thus enforceability. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 293 Kan. 633, 642, 270 P.3d 1074, 1080 (2011) (*Americold III*[3]). Judge Sieve denied NPIC's motion, *see* C.A. App. at A247, and then determined that NPIC asserted its "clean-smoke" – "dirty-smoke" defense in bad faith as a belated effort to avoid coverage. C.A. App. at A571-A572. Judge Sieve entered judgment on ConAgra's

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[3] *Americold II* involved NPIC's appeal to the Kansas Supreme Court seeking reversal of a ruling disqualifying one of the four law firms NPIC hired to defend itself. *See Associated Wholesale Grocers, Inc. v. Americold Corp.*, 266 Kan. 1047, 1047, 975 P.2d 231, 232 (1999).

and Swift's separate claim that their Consent Judgment was reasonable awarding $11,987,489.52 plus attorneys' fees and expenses. *See* C.A. App. at A247, A290-A291. ConAgra's and Swift's award fell within *Americold I*'s determination that $25 million was available to pay claims.

NPIC appealed, and on December 23, 2011, over 14 years after *Americold I* and nearly six years after Judge Sieve tried the Garnishment Action, the Kansas Supreme Court in *Americold III* reversed, finding the Consent Judgments dormant. The judgments against NPIC were vacated, and the Garnishment Action dismissed without prejudice. *See* C.A. App. at A248.

The Tenant Plaintiffs then demanded that Americold execute stipulations to revive the judgments, *see* C.A. App. at A248, and without explanation, Americold refused. The Tenant Plaintiffs sued in state court, *see* C.A. App. at A9, claiming that Americold breached the Agreement's cooperation obligations by refusing to sign the additional documents to "effectuate the Agreement's purpose" and "pursue the assigned claims" permitting collection under NPIC's undisputed insurance coverage. *See* C.A. App. at A20-A21. Americold then removed claiming diversity jurisdiction as a Maryland Real Estate Investment Trust ("REIT"). J.A. at 8-11.

When Americold embraced NPIC's cause by refusing to cooperate, ConAgra and Swift were dumbfounded. Under the Agreement, Americold faced no

liability for such perfunctory acts; yet Americold joined NPIC's tactical battle spending hundreds of thousands of dollars fighting a conflict in which Americold had no stake. Ironically, Americold agrees it owed the money and consented to judgments, C.A. App. A246, knows that the Kansas Supreme Court ruled the $25 million NPIC policy covered the precise smoke damage suffered by ConAgra and Swift, *Americold I*, 261 Kan. at 824-26, 934 P.2d at 78-79, and knows the Agreement's purpose included ensuring NPIC's efforts not be rewarded by escaping scot-free after providing $25 million to cover the precise losses sustained by ConAgra and Swift. Consenting to the stipulation furthers that purpose because Americold, ConAgra, and Swift never intended for NPIC to secure a $25 million windfall from its bad faith coverage denial and delay tactics.

The district court ultimately granted Americold's motion for summary judgment ruling that *Americold III* foreclosed any ability to revive the judgments. ConAgra and Swift appealed, and while on appeal, the Tenth Circuit raised jurisdictional issues and requested briefing. Pet. App. at 21-22. Both the jurisdictional questions and the merits of the district court's summary judgment were argued before the court, but the Tenth Circuit never reached a decision on ConAgra's and Swift's claims that the district court erred in granting summary judgment, only ruling that the district court had no jurisdiction to decide the case. The Tenth Circuit concluded that because Americold's beneficiary-shareholders were

undeniably citizens of the same states as the Tenant Plaintiffs, diversity failed. *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1182 (10th Cir.), *as amended* (Jan. 27, 2015), *cert. granted*, 136 S. Ct. 27 (2015).

SUMMARY OF THE ARGUMENT

This case presents the straightforward question of whether to measure a state law artificial entity's citizenship for diversity by its beneficial owners or a titular board of managers. The answer is equally straightforward – under this Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), that citizenship is measured by the entity's beneficial members, here nominally called shareholders under Maryland law.

Indeed, diversity jurisdiction invoked through non-corporate juridical entities – entities possessing capacity to sue and be sued under state law – must be established by measuring citizenship through all the entities' members. Maryland REITs which choose to be "an unincorporated business trust or association" and not a "corporation" possess juridical-person status with capacity to sue or be sued. Maryland REITs choosing unincorporated status must measure citizenship by aggregating all their members' citizenship under 28 U.S.C. § 1332.

Indeed, this Court has "often had to consider the status of artificial entities created by state law

insofar as that bears upon the existence of federal diversity jurisdiction." *Carden*, 494 U.S. at 187 Corporations are citizens where incorporated and principally doing business. *E.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); 28 U.S.C. § 1332(c)(1). All other unincorporated artificial entities are citizens of every state where their members are citizens. *E.g.*, *Carden*, 494 U.S. at 189-91. The Court decidedly concluded that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have just as firmly resisted extending that treatment to other entities." *Id.* at 189.

Here, Maryland REITs are either a corporation on one side of the doctrinal wall or an unincorporated entity or association on the other. *See id.* Indeed, a Maryland REIT may choose to be a "corporation" or an unincorporated association. *Brief for the National Association of Real Estate Investment Trusts as* Amicus Curiae *Supporting Reversal* ("NAREIT Brief") at 4 n.2, 16-17. Notably, Americold chose to be an unincorporated association under Maryland statutes. Pet. App. at 58-59; Md. Code Ann., Corps. & Ass'ns § 8-101(c).

Naturally, under Maryland law, Americold is a "separate legal entity"; *i.e.*, an "unincorporated business trust or association." Md. Code Ann., Corps. & Ass'ns § 8-102. Americold can "[s]ue, be sued, complain, and defend in all courts" in its own name. § 8-301(2); Pet. App. at 59. As a non-corporate artificial entity, Americold cannot breach the "doctrinal wall of *Chapman v. Barney*" reaffirmed in *Carden* to claim

citizenship in its own right. Remarkably, Petitioners plainly admit that "no party contends that a trust should be treated as a citizen in its own right." *Brief for the Petitioners* at 21.

Indeed, most common law trust estates decidedly possess no capacity to sue or be sued, lacking a distinct legal identity, but rather comprise estates embedded with common law fiduciary duties and contract rights necessary to administer property. *See Brief of Winston Wen-Young Wong as* Amicus Curiae *in Support of Petitioners* ("Dr. Wong Brief") at 13-14 (quoting RESTATEMENT (THIRD) OF TRUSTS § 2 and 76 AM. JUR. 2d *Trusts* § 3). Thus, as *Carden* notes, trust estates lack juridical-person status. 494 U.S. at 194 (*Navarro* "involved not a juridical person but the distinctive common-law institution of trustees"). So, Maryland REITs created under state statute as unincorporated associations granted juridical-entity status naturally can't be common law trusts which lack the capacity to sue or be sued.

And, this Court decidedly left no doubt that unincorporated artificial entity "members" include, at minimum, all of the entity's beneficial owners. Of course, both general and limited partnerships include all partners as "members." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 569 (2004) (citing "the accepted rule that . a partnership . . is a citizen of each State or foreign country of which any of its partners is a citizen" (citing *Carden*, 494 U.S. at 192-95)). Similarly, limited liability companies aggregate each member's (*i.e.*, owner's) citizenship for diversity

purposes. *See id.* at 586 n.1 (Ginsburg, J., dissenting) ("Although the Court has never ruled on the issue, Courts of Appeals have held the citizenship of each member of an LLC counts for diversity purposes." (citing *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004) and *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998)).

Yet, Americold strains credulity insisting that because common law trust beneficiaries aren't liable for the trustee's or trust estate's obligations, and likewise Maryland statutory REIT shareholders aren't liable for the REIT's or its managers' obligations, that the common law trust and statutory REIT must be synonymous. *See Brief for the Petitioners* at 8-9, 17-19. Just because common law beneficiaries can't be sued for the trust estate's obligations or trustees' actions and Maryland REIT "shareholders" can't be sued for the REIT's or its managers' actions doesn't morph the beneficiaries and shareholders into the same thing in all respects. Indeed, there are countless legal relationships where one party possesses no responsibility to answer for another and that common characteristic in no way makes those persons the same in all respects. A few simple examples sufficiently sharpen the point.

For instance, limited partners, limited liability company members, and corporation stockholders traditionally possess no liability for the artificial entities' or their managers' conduct. *See* Kan. Stat. Ann. § 56-1a203(a) (generally "a limited partner is

not liable for the obligations of a limited partnership"); Kan. Stat. Ann. § 17-7688(a) (members and managers of LLC not liable for LLC obligations); *Coles v. Taliaferro*, 251 Kan. 648, 655, 840 P.2d 1102, 1106 (1992) ("Generally, debts of a corporation are not the individual indebtedness of its stockholders."). If we apply Americold's no-liability-for-beneficiaries-and-shareholders thesis to limited partners, limited liability company members, and corporation stockholders, then won't all be treated like common law trust beneficiaries because they possess no liability for the entities' or their managers' actions? As such, doesn't Americold's thesis lead to the conclusion that limited liability companies, limited partnerships, and corporations must be treated like common law trusts, measuring diversity citizenship by their managers? Answering the question indicts the proposition, and such an untenable conclusion requires the Court to ignore *Carden* because it rejected this identical argument. *See* 494 U.S. at 195-96.

Instead, Maryland REIT shareholders are virtually identical to limited partners and LLC members in that all three invest capital in artificial entities and own beneficial, transferrable entity interests without personal responsibility for the entities' or their managers' liabilities. The beneficial owners' limited liability provides no guidance in determining the entities' citizenship. Likewise, only looking to REIT managers, nominally called trustees, to determine citizenship "finds even less support" because this Court has "never held that an artificial entity,

suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members." *Id.* at 192.

Here, Americold's "membership" for diversity purposes includes all of its owners, denominated as "shareholders" under Maryland law. Under Americold's Trust Declaration and Maryland REIT statutes, "beneficial interest[s]" in Americold are represented by "shares." Pet. App. at 64; *see also* Md. Code Ann., Corps. & Ass'ns § 8-101(d). As beneficial interest owners, Americold's "shareholders" are its "members." *See Carden*, 494 U.S. at 189-97.

Finally, if Americold's citizenship is determined by the trustees' citizenship as urged, Americold failed to establish diversity jurisdiction. Flawed diversity jurisdiction invalidates any final judgment where indispensable parties are not completely diverse at the time judgment is entered. Here, the Americold trustees never established complete diversity between themselves and the Tenant Plaintiffs at the time judgment was entered. That is, at removal, Americold trustees were citizens of California and Massachusetts. *See* Pet. App. at 51. And, on the other side of the diversity ledger, Plaintiffs Safeway, Inc. ("Safeway") and Hanover, Inc. ("Hanover") were also California and Massachusetts citizens. J.A. at 23. This diversity defect remained "[un]cured" – it "lingered through judgment." *Cf. Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996). Naturally, this requires

remand even if the Americold trustees' citizenship is determinative for diversity purposes.

ARGUMENT

I. Diversity jurisdiction invoked through non-corporate juridical entities – entities possessing capacity to sue and be sued under state law – must be established by measuring citizenship through all the entities' members. Maryland REITs which choose to be "an unincorporated business trust or association" and not a "corporation" possess juridical-person status with capacity to sue or be sued. Maryland REITs choosing unincorporated status must measure citizenship by aggregating all their members' citizenship under 28 U.S.C. § 1332.

ConAgra and Swift agree with Petitioners that diversity jurisdiction is based upon Article III of the Constitution; the Judiciary Act of 1789, enacted by the First Congress, vested lower federal courts with jurisdiction where a "suit is between a citizen of the State where the suit is brought and a citizen of another State"; and that the diversity statute has been amended over time, but remains substantively unchanged at its core – requiring a threshold amount in controversy and diverse citizenship. *See Brief for the Petitioners* at 11-12. That's where any agreement ends, and Americold's failure to confront its

non-corporate juridical-entity status under Maryland law dooms its cause to reverse the Tenth Circuit's decision.

First, this Court has "often had to consider the status of artificial entities created by state law insofar as that bears upon the existence of federal diversity jurisdiction." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990). Any artificial entity party seeking to invoke diversity jurisdiction must show the parties have capacity to sue or be sued and are diverse. Fed. R. Civ. P. 17; 28 U.S.C. § 1332. Notably, courts only recognize juridical entities as those with the capacity to sue or be sued under state law. *See, e.g.*, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 266 (1992) ("The presence of [power to sue or be sued] language . . . merely establishes that the Red Cross is a juridical person which may be party to a lawsuit in an American court. . ."); *see also Carden*, 494 U.S. at 194 (noting that *Chapman*, *Great Southern*, and *Bouligny* "did involve juridical persons").

Second, the Court has erected a rigid structure for determining citizenship under 28 U.S.C. § 1332, and this case presents no justification for destroying it and erecting a new one. Natural persons' citizenship is measured by their state of domicile. *E.g.*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006); *Gilbert v. David*, 235 U.S. 561, 569 (1915). Corporations are citizens where incorporated and principally doing business. *E.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); 28 U.S.C. § 1332(c)(1). All other unincorporated artificial entities are citizens of every

state where their members are citizens. *E.g.*, *Carden*, 494 U.S. at 189-91. The Court decidedly concluded that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . just as firmly resisted extending that treatment to other entities." *Id.* at 189.

Third, as recognized by *Amicus* Dr. Wong, *Carden* doesn't extend beyond associations that have no separate state law artificial existence largely because any such action by federal courts recognizing artificial entities without regard to, or even despite, a governing state's refusal to do so offends Rule 17(b) of the Federal Rules of Civil Procedure and the Rules Enabling Act. Dr. Wong Brief at 29. More significantly, such actions offend the Constitution and the system of federalism on which our government was founded. Important characteristics such as the legal existence and the ability to own property are substantive matters. *See Busby v. Elec. Utils. Emps. Union*, 323 U.S. 72, 77 (1944) (Frankfurter, J., concurring) (entity's "status" is a "substantive issue"); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 604 (1974) ("[T]he definition of property rights is a matter of state law."). Federal courts must look to state substantive law regarding an artificial entity's separate legal existence and ability to hold property insofar as they bear on diversity jurisdiction.

Notably, non-corporate artificial juridical entities – entities possessing capacity to sue or be sued under state law – must satisfy diversity requirements before federal courts may exercise subject

matter jurisdiction.[4] That is, to invoke diversity jurisdiction, the pleadings must show that entities named as parties possess capacity to sue or be sued as juridical entities and facts demonstrating such parties' citizenship. *See, e.g.*, *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936) ("The party who seeks the exercise of jurisdiction . must allege in his pleading the facts essential to show jurisdiction."); *see also Hillsborough Twp., Somerset Cty., N.J. v. Cromwell*, 326 U.S. 620, 626 (1946) ("[T]he jurisdiction of the District Court is determined by the allegations of the bill. . . ."); Fed. R. Civ. P. 9(a)(1); *cf. Mallory & Evans Contractors & Engineers, LLC v. Tuskegee Univ.*, 663 F.3d 1304, 1305 (11th Cir. 2011) (finding court lacked jurisdiction where complaint failed to allege citizenship of LLC members and university). Stated another way, only where artificial entity parties under state law invoke diversity jurisdiction will the entity-parties' citizenship be significant.

Just as importantly, diversity jurisdiction determinations should be "as self-regulated as breathing," *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (quoting Currie, *The Federal Courts and the*

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[4] This Court recognizes, however, that associations not granted juridical status under state law nevertheless may be juridical entities and proper parties to a suit only when a substantive right existing under the United States Constitution or laws is at issue. *See United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 388-89 (1922); Fed R. Civ. P. 17(b)(3)(A).

American Law Institute, Part I, 36 U. CHI. L. REV 1 (1968)), and in confirming an artificial entity's invocation of diversity jurisdiction, "[c]apacity to sue or be sued is determined . for all [non-individual non-corporate] parties, by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). Stated differently, federal courts look to state law grants of capacity to sue or be sued upon various unincorporated entities and associations when determining their federal diversity jurisdiction. *See, e.g.*, *Carden*, 494 U.S. at 187 (noting federal courts consider artificial entity status under state law insofar as it bears on diversity jurisdiction).

Indeed, this Court has looked to state law capacity to sue and be sued granted to artificial entities invoking diversity jurisdiction on several occasions when measuring the citizenship of those artificial entities. *See, e.g.*, *Carden*, 494 U.S. at 194 (Arizona limited partnership); *United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965) (labor union[5]); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 454 (1900) (Pennsylvania limited partnership association); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (New York joint stock company).

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[5] Arguably the Court in *Bouligny* expressed doubt that labor unions were juridical persons. 382 U.S. at 153 (refusing to treat unions as corporations for diversity purposes but noting "widespread support for the recognition of labor unions as juridical personalities"). But *Carden* expressly states that *Bouligny* "did involve [a] juridical person[ ]." 494 U.S. at 194.

So, to invoke diversity jurisdiction, a state law non-corporate juridical entity must plead facts demonstrating capacity to sue or be sued and its aggregate citizenship to meet such diversity requirements. *E.g.*, *Geer v. Cox*, 242 F. Supp. 2d 1009, 1025 (D. Kan. 2003); R. 9(a)(1). That is, it must plead the citizenship of all its members demonstrating the Court's subject matter jurisdiction. *See, e.g.*, *Carden*, 494 U.S. at 194.

Here, Maryland grants REITs like Americold non-corporate juridical-entity status with the capacity to sue or be sued. *See* Md. Code Ann., Corps. & Ass'ns § 8-301(2). So, Maryland REITs as non-corporate juridical entities under state law seeking to invoke diversity jurisdiction must plead the bases upon which they invoke such jurisdiction including their members-shareholders' citizenship. By plainly showing the bases for diversity, the lower courts' diversity determination is "as self-regulated as breathing."

Under this bifurcating doctrinal wall segregating corporations from all other non-corporate artificial entities with capacity to sue or be sued, Americold chose to be a non-corporate Maryland REIT, requiring Americold to plainly show the bases for diversity jurisdiction by aggregating the citizenship of all its member-shareholders. This Court pronounced the wall impenetrable, and Americold articulates no forceful bases upon which to breach it by overlooking its failure to plainly establish diversity jurisdiction.

A. Unincorporated juridical entities who by definition are not natural persons or corporations must measure citizenship by aggregating all their members' citizenship. Maryland REITs which choose to be "an unincorporated business trust or association" must measure citizenship by aggregating all their members' citizenship under 28 U.S.C. § 1332.

The Court's rigid "doctrinal wall" between corporations and all other unincorporated juridical entities provides a transparent framework to determine an artificial entity's citizenship for diversity purposes. *See Carden*, 494 U.S. at 189-90. *First*, as stated, corporations are citizens where incorporated (and, pursuant to 28 U.S.C. § 1332(c)(1), where principally doing business); unincorporated entities are citizens of every state of which their members are citizens. *Carden*, 494 U.S. at 188-89, 195-96. This rule "depends on the citizenship of 'all the members,' . . 'the several persons composing such association,' [and] . . 'each of its members.'" *Id.* at 195-96 (finding all partners – limited and general – must be considered for diversity purposes) (quoting *Chapman*, 129 U.S. at 682; *Great Southern*, 177 U.S. at 456; and *Bouligny*, 382 U.S. at 146).

Here, Maryland REITs are either a corporation on one side of the doctrinal wall or an unincorporated entity or association on the other. *See Carden*, 494 U.S. at 188-92. Indeed, a Maryland REIT may choose

to be a "corporation" or an unincorporated association. NAREIT Brief at 4 n.2, 16-17 Maryland REITs choosing non-corporate status have the capacity to sue or be sued under state law and therefore are juridical entities. Md. Code Ann., Corps. & Ass'ns § 8-301(2); *see also* § 8-102(2); *Red Cross*, 505 U.S. at 266. Notably, Americold chose to be an unincorporated association under Maryland statutes which provide:

> "Real estate investment trust" means an unincorporated business trust or association formed under this title in which property is acquired, held, managed, administered, controlled, invested, or disposed of for the benefit and profit of any person who may become a shareholder.

Md. Code Ann., Corps. & Ass'ns § 8-101(c).

Under Maryland law, Americold is a "separate legal entity"; *i.e.*, an "unincorporated business trust or association." § 8-102. Americold can "[s]ue, be sued, complain, and defend in all courts" in its own name. § 8-301(2); Pet. App. at 59. As a non-corporate artificial entity, Americold cannot breach the "doctrinal wall of *Chapman v. Barney*" reaffirmed in *Carden* to claim citizenship in its own right. Remarkably, Petitioners plainly admit that "no party contends that a trust should be treated as a citizen in its own right." *Brief for the Petitioners* at 21.

Not surprisingly, both *amicus* briefs readily acknowledge Americold's artificial-juridical-entity status under state law. *Amicus* National Association

of Real Estate Investment Trusts ("NAREIT") urges that a Maryland REIT is a "separate 'juridical person'; created by state law and given its own 'birth certificate'; liable for its own debts without recourse to the assets of its members; and governed not by its members but by an elected board." NAREIT Brief at 11. *Amicus* Dr. Wong agrees. Dr. Wong Brief at 6-17.

Second, most common law trust estates decidedly possess no capacity to sue or be sued, lacking a distinct legal identity, but rather comprise estates embedded with common law fiduciary duties and contract rights necessary to administer property. *See* Dr. Wong Brief at 13-14 (quoting RESTATEMENT (THIRD) OF TRUSTS § 2 and 76 AM. JUR. 2d *Trusts* § 3). Thus, as *Carden* notes, trust estates lack juridical-person status. 494 U.S. at 194 (*Navarro* "involved not a juridical person but the distinctive common-law institution of trustees"); *cf. Neonatal Prod. Grp., Inc. v. Shields*, No. 13-CV-2601-DDC-KGS, 2014 WL 6685477, at *4 n.1 (D. Kan. Nov. 26, 2014) ("The trustees of a trust, not the trust itself, are the proper defendants in a suit against a trust.").

But, the common law's refusal to recognize trusts as juridical entities lacks the necessary elasticity to stretch it beyond recognition by applying it to dissimilar circumstances. That is, common law trusts' incapacity to sue or be sued can't be stretched far enough to undermine a statutory REIT's express grant of artificial-entity status with such rights to sue or be sued. And, where state law grants juridical-entity status to relationships only formerly recognized

under common law, those newly-created juridical entities nevertheless possess artificial-entity status. For instance, if a state grants common law trusts the capacity to sue or be sued in the same way states granted common law partnerships the capacity to sue and be sued, *e.g.*, Unif. P'ship Act § 307 (1997), then such trusts become juridical persons under state law and a proper artificial entity party under Rule 17(b). Some states have granted what was formerly a traditional common law charitable trust estate such capacity to sue and be sued under state law. *See, e.g.*, Unif. Statutory Trust Entity Act §§ 201, 302; Ky. Rev. Stat. Ann. § 386A.1-010 *et seq.*; Del. Code Ann. tit. 12, § 3801 *et seq.* Obviously, when any former state law trust estate is now granted artificial-entity status and seeks to invoke diversity jurisdiction in federal courts, these newly-created juridical entities' citizenship must be measured by aggregating all of their beneficial owners' citizenship under *Carden*.

So, Maryland REITs created under state statute as unincorporated associations granted juridical-entity status naturally can't be common law trusts which lack the capacity to sue or be sued. Frankly stated, common law trusts possess no juridical-entity status making them instinctively different than REIT associations which may choose artificial entity unincorporated status. Under *Carden*, such entities must measure citizenship by aggregating all the REITs' members' citizenship.

B. Non-corporate juridical entities' "members" for diversity purposes include those persons holding a beneficial and/or economic interest. A Maryland REIT is a non-corporate juridical entity with member-shareholders possessing beneficial and/or economic interests. A Maryland REIT's "members" for diversity purposes include each of its shareholders.

1. Holders of beneficial and/or economic interests are the "members" of non-corporate juridical entities. Shareholders are the holders of the beneficial and/or economic interests in Maryland REITs, and so are its "members."

This Court has "oft [] repeated" the rule that diversity jurisdiction in a suit by or against an unincorporated, artificial entity depends on the citizenship of "all the members." *Carden*, 494 U.S. at 195-96. *Carden*'s framework squarely applies here. *Id.*

First, this Court decidedly left no doubt that unincorporated artificial entity "members" include, at minimum, all of the entity's beneficial owners. Indeed, both general and limited partnerships include all partners as "members." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 569 (2004) (citing "the accepted rule that . . . a partnership . . . is a citizen of each State or foreign country of which any of its partners is a citizen" (citing *Carden*, 494 U.S. at

192-95)). Similarly, limited liability companies aggregate each member's (*i.e.*, owner's) citizenship for diversity purposes. *See id.* at 586 n.1 (Ginsburg, J., dissenting) ("Although the Court has never ruled on the issue, Courts of Appeals have held the citizenship of each member of an LLC counts for diversity purposes." (citing *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004) and *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998)).

Yet, Americold strains credulity insisting that because common law trust beneficiaries aren't liable for the trustee's or trust estate's obligations and likewise Maryland statutory REIT shareholders aren't liable for the REIT's or its managers' obligations, that the common law trust and statutory REIT must be synonymous. *See Brief for the Petitioners* at 8-9, 17-19. Just because common law beneficiaries can't be sued for the trust estate's obligations or trustees' actions and that Maryland REIT "shareholders" can't be sued for the REIT's or its managers' actions doesn't morph the beneficiaries and shareholders into the same thing in all respects. Indeed, there are countless legal relationships where one party possesses no responsibility to answer for another and that common characteristic in no way makes those persons the same in all respects. A few simple examples sufficiently sharpen the point.

For instance, limited partners, limited liability company members, and corporation stockholders traditionally possess no liability for the artificial

entities' or their managers' conduct. *See* Kan. Stat. Ann. § 56-1a203(a) (generally "a limited partner is not liable for the obligations of a limited partnership"); Kan. Stat. Ann. § 17-7688(a) (members and managers of LLC not liable for LLC obligations); *Coles v. Taliaferro*, 251 Kan. 648, 655, 840 P.2d 1102, 1106 (1992) ("Generally, debts of a corporation are not the individual indebtedness of its stockholders."). So, peeking behind the curtain of Americold's position shows the Wizard feverishly pulling levers discharging distractions hoping to avoid the obvious question: If we apply Americold's no-liability-for-beneficiaries-and-shareholders thesis to limited partners, limited liability company members, and corporation stockholders, then won't all be treated like common law trust beneficiaries because they possess no liability for the entities' or its managers' actions? As such, doesn't Americold's thesis lead to the conclusion that limited liability companies, limited partnerships, and corporations must be treated like common law trusts, measuring diversity citizenship by their managers? Naturally, answering the question indicts the proposition, and such an untenable conclusion requires the Court to ignore *Carden* because it rejected this identical argument. *See* 494 U.S. at 195-96.

Notably, Americold's similarly unfounded insistence that artificial entities called Real Estate Investment Trusts and common law fiduciary relationships called "trusts" must be the same thing

because they both use the word "trust" lacks weightiness.[6] Simply put, it's as thin as a toothpick because surely using a similar word to label two distinct things does not make them the same thing in every way. Of course, calling a smart car and a Hummer "automobiles" doesn't make them the same in all respects, and naturally you wouldn't take a smart car on an off-road mountainous hunting trip, nor try to parallel park a Hummer in a space where only a motorcycle or smart car can fit. They obviously are not the same in all respects, and are instinctively and decidedly different under specific circumstances. Americold's insistence that common law beneficiaries and Maryland REIT shareholders are positionally identical for diversity purposes because they share the moniker "trust" ignores the decided and instinctive differences between common law trusts and Maryland REIT associations.

Instead, Maryland REIT shareholders are virtually identical to limited partners and LLC members in that all three invest capital in artificial entities and own beneficial, transferrable entity interests without personal responsibility for the entities' or their managers' liabilities. The beneficial owners' limited liability provides no guidance in determining

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[6] *Amicus* NAREIT agrees: "Petitioner is not just any trust. [I]t is an entity organized under [the Maryland REIT statute]. Its citizenship should therefore turn on the characteristics of a Maryland Trust REIT, not on the general label 'trust.'" NAREIT Brief at 11.

the entities' citizenship. Likewise, only looking to REIT managers, nominally called trustees, to determine citizenship "finds even less support" because this Court has "never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members." *Carden*, 494 U.S. at 192.

Third, common law trusts lacking artificial-entity status invoke unique traditions unmistakably distinct from state law artificial entities. For instance, common law trust settlors traditionally contribute the *res* in the form of a gift for the beneficiaries. *E.g.*, *Taliaferro v. Taliaferro*, 260 Kan. 573, 578, 921 P.2d 803, 808 (1996); *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002). For the statutory entities at issue here and in *Carden*, the investors make no gift benefiting others. Besides, common law beneficiaries typically don't buy and sell interests in the donated *res*, and yet investors typically buy and sell interests in REITs, limited partnerships, or limited liability companies. Assuredly, Americold's oblique insistence that Maryland REIT shareholders are positionally equal to common law trust beneficiaries is an ungainly distraction at best.

Here, Americold's "membership" for diversity purposes includes all of its owners, denominated as "shareholders" under Maryland law. Under Americold's Trust Declaration and Maryland REIT

statutes, "beneficial interest[s]" in Americold are represented by "shares." Pet. App. at 64; *see also* Md. Code Ann., Corps. & Ass'ns § 8-101(d). As beneficial interest owners, Americold's "shareholders" are its "members." *See Carden*, 494 U.S. at 189-97.

2. Maryland REIT trustees hold no beneficial and/or economic interests as trustees and as such are not "members." Maryland REIT boards of trustees act similarly to LLC boards of managers.

Petitioners erroneously urge that Americold's beneficial owners must be ignored in determining Americold's "members," and instead claim "[t]he members of an unincorporated association are those persons who would have been liable at common law for the artificial entity's obligations." *Brief for the Petitioners* at 23. As set out above, turning a blind eye to the Court's doctrinal wall will lead only to treating REITs, limited partnerships, limited liability companies, and corporations alike; and decidedly turns the Court's doctrinal wall into a doctrinal speed bump. Americold's efforts to chisel down the wall are unavailing.

First, Americold roots its lack-of-common-law-liability analogy in "several nineteenth century cases" which Americold insists "draw [a] parallel between trustees and members of unincorporated associations" based on similar capacities to sue or be sued. *Brief for the Petitioners* at 25-26. These cases provide

no fertile ground for Americold, but instead have nothing to do with measuring diversity jurisdiction for non-corporate artificial entities (Americold cites only state court cases). *See id.* Americold's nineteenth century cases involve only non-juridical, unincorporated common law trusts or associations without capacity to sue or be sued under state law. This extended common law trustees' capacity to sue or be sued discussion clings almost exclusively to inapposite cases discussing non-juridical, common law trusts having nothing to do with Maryland REITs created as juridical entities. *See, e.g., Brief for the Petitioners* at 12.

At best, Americold's cases only reaffirm common law trustees' ability, under certain circumstances, to sue or be sued – without naming the beneficial interest holders in the *res*.[7] But, the cases nowhere suggest

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[7] *Brief for the Petitioners* at 25-26 (citing *Laughlin v. Greene*, 14 Iowa 92, 94 (1862) (holding action properly brought by trustee of an unincorporated "trust company," and the action should not have been asserted in the name of the "trust company" because it possessed no power to "sue and be sued in that name"); and *Bryan v. Stevens*, 4 F. Cas. 510, 511 (C.C.S.D.N.Y. 1841) (plaintiffs holding patent rights "in trust" properly brought action in their own names without naming all persons with beneficial interest in trust property); and *Thomas v. Dakin*, 22 Wend. 9, 34-35 (N.Y. Sup. Ct. 1839) (recognizing unincorporated associations cannot "sue or be sued in its assumed name," but "[the court] recognizes individuals, who claim to be heard in their own right, or as trustees for others")). Americold similarly cites *Weaver v. Trustees of Wabash & E. Canal*, 28 Ind. 112, 120 (1867); *Trustees of the Methodist Episcopal Protestant Church at Jefferson v. Adams*, 4 Or. 76, 88 (1870); *Kuhl v. Meyer*, 35 Mo.

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that a trustee's capacity to sue or be sued morphed the trust into a juridical entity and the trustees' into the entity's sole "members." In other words, Americold's relied-upon authorities involving common law trustees' capacity to sue or be sued provide no guidance in determining a juridical entity's "membership."

Second, there is no serious argument that Americold is a "traditional trust," but only an artificial juridical entity controlled by *Carden*. Americold repeatedly refuses to confront its status as a non-corporate juridical entity under Maryland law. Indeed, both *amici* agree that Americold possesses juridical-entity status. *See, e.g.*, Dr. Wong Brief at 4 ("Should the Court . . . determine that diversity jurisdiction in the case at bar depends on the citizenship of the beneficiaries of Americold, the Court should expressly limit its holding to the specific type of trust at issue in this case, *i.e.*, a statutory business trust that is a legal entity under state law. The Court should distinguish between a statutory trust that is a legal entity under state law and a traditional trust, which is not. "); *see also, e.g.*, NAREIT Brief at 21-22 ("Significantly, however, the Maryland Trust REIT is *not* a common-law entity, nor even – unlike the limited partnership in *Carden* – a statutory modification of a common law entity. . . . [N]otwithstanding the word 'trust' in its name, the Maryland Trust REIT is entirely a creature of statute."). And, Americold

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App. 206, 211 (1889); and *Hecker v. Cook*, 20 Colo. App. 282, 78 P. 311 (1904) for the same proposition.

understandably offers no contrary authority that courts ignore a juridical entity's beneficial owners in determining that entity's "membership" for diversity purposes, obviously because this Court expressly rejected an identical argument in *Carden*.

Decidedly, *Carden* expressly rejected any argument importing a "real party to the controversy test" to "the quite different question of how the citizenship of [a] single artificial entity is to be determined." 494 U.S. at 188 n.1. Such a "real party to the controversy test" resting on "control" over the unincorporated association, the Court held, has "played no part in our decisions" determining an artificial, juridical entity's citizenship:

> This approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization (for which one could at least point to *Russell*). We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members. No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions.

Id. at 192.

Americold nevertheless trots out the same old "real party to the controversy test" urged and rejected in *Carden*. Yet, *Carden* makes clear an artificial entity's "membership" must not be measured by "control," but must be determined by aggregating all the entity's beneficial owners' citizenship. Here, like *Carden*'s limited partners, Americold's "shareholders" own the artificial entity named as a party. They are Americold's "members."

Third, this Court's decision in *Navarro* presents no exception to this structure and fits squarely within its framework. *See* 446 U.S. at 465-66. That is, the *Navarro* decision shows that if parties to the controversy are natural persons serving as trustees, suing as natural persons to collect notes payable to themselves, and possessing capacity to sue or be sued under state law, then diversity is measured by those natural persons' citizenship. *Id.* at 459. So, natural persons properly named as parties suing in their own name, properly before the court, requires only looking to those natural persons' citizenship.

Indeed, both circuits that substantively peered into state law artificial entities merely labelled "trusts" ruled that the entities' members included, at a minimum, their beneficial owners by which citizenship must be measured. *See ConAgra Foods*, 776 F.3d at 1181; *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1338-40 (11th Cir. 2002) (holding a trust's citizenship is determined by reference to the beneficiaries), *overruled in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith*

Inc. v. Dabit, 547 U.S. 71 (2006). Here, Americold chose to be a state law association merely labelled a trust, which naturally leads to the conclusion that its shareholders constitute its members.

C. Americold's line-blurring assertions urge this Court to now measure non-corporate juridical entities by a titular board of managers instead of its members, leading only to confusion and extensive threshold litigation for lower courts.

Americold's urgings to reverse the Tenth Circuit by measuring an artificial entity's citizenship by a titular board of managers falls flat for several reasons, but just as importantly, if adopted only leads to confusion and extensive threshold litigation. *First*, Americold refuses to confront that it is not a "traditional" common law express trust, and as such, Americold blindly urges an ill-fitted rule with no applicability to Maryland REITs. *See Brief for the Petitioners* at 11-19. Like a man wearing an ill-fitted suit much too small for his lanky configuration, Americold insists on outfitting Maryland REITs with a suit too small – the sleeves and pant legs are too short, leaving only an oafish appearance.

Nevertheless, Americold stretches as far as possible this ill-fitted assertion, urging that this Court must ignore the REITs' beneficial shareholders and only look to the titular board of managers called trustees. Initially, as set out above, Americold

erroneously insists that REIT managers are the same as common law trustees. *Id.* at 12. Americold then doubles down on this improvident initial conclusion by urging that because both REIT managers and the *Navarro* trustees hold title to trust property "in their names," *id.* at 13 (quoting *Navarro*, 446 U.S. at 465); *id.* at 15 (trustees conducted litigation in their names "because the trustees held legal title to all trust property"), *Navarro* must control. *Id.* at 16; *id.* at 28 (capacity of trust to sue or be sued "does not alter the fact that the trustee holds legal title to trust property").

But, Americold attempts to sweep under the rug the simple fact that Maryland REIT entities, not the board of managers, hold title to the entities' property. *See* Md. Code Ann., Corps. & Ass'ns § 8-101(b) (REIT by definition is an entity "in which property is acquired [and] held"). Americold not only ignores this, but even boldly asserts: "The Americold Trust falls squarely within the *Navarro* principle. Like the trustees in *Navarro*, Americold's trustees hold legal title to the assets of the trust." *Id.* at 19. Lost on Americold is Maryland's statutory REIT definition which provides for assets held by the entity, not the managers. Indeed, Americold's trust declaration provides that the entity was formed to, *inter alia*, "acquire" and "hold" property and that the board of trustees have mere "control and authority" over REIT assets. Pet. App. at 59-60.

Americold swept up such a dust cloud that its rug can't cover it all because Americold provides no record

or statutory citation supporting its claim that Maryland REIT trustees hold title to property. Instead Americold only provides the trust declaration which shows the entity acquires and holds the property – a fact that can't be covered up and a fact that clouds Americold's primary assertion.

Second, Petitioners fail to recognize that, unlike common law trusts, Americold as a Maryland REIT is a juridical entity, and as such, it possesses the capacity to sue or be sued. *See* Md. Code Ann., Corps. & Ass'ns § 8-302(2); *see also* Dr. Wong Brief at 14-17; *cf.* § 8-102(2) (providing that a REIT is "a separate legal entity"). Americold again ignores this basic characteristic differentiating artificial entities to which *Carden* applies from cases involving natural persons suing in their own names as trustees in *Navarro*. Here, no natural persons as trustees are being sued; rather, an artificial, non-corporate juridical entity is being sued in its own right.

Third, Americold claims *Navarro* made the following pronouncement: "*Navarro* could not have been more explicit: for purposes of diversity jurisdiction, a business trust is to be treated no differently than a traditional trust." *Brief for the Petitioners* at 30. First, neither a "business trust" nor a "traditional trust" is a specific, particular, entity with similar legal rights throughout every jurisdiction. Entities named "trusts" – whether colloquially referred to as "business trusts," "traditional trusts," "common law trusts," "statutory trusts," *etc.* – can exist in various forms with distinct legal rights depending on state

law. As stated above, *Carden* and its precedent must not be ignored simply because an entity is called a "trust" under state law.

Moreover, *Navarro* said nothing, let alone explicitly, about how to "treat" a "trust," business or otherwise, for diversity. Rather, *Navarro* stands for the quite unremarkable proposition that where a trustee properly brings suit, that trustee's citizenship counts for diversity purposes. *See Carden*, 494 U.S. at 191-92. Following *Carden* and applying the "members" test to a non-corporate state law entity will hardly be "breaking new ground" by this Court. *Brief for the Petitioners* at 30.

Fourth, these analytical deficiencies similarly doom Americold's Tenth Circuit criticism that *Carden* "involv[ed] no trust, no trust property, no trustees, and no trust beneficiaries." *Brief for the Petitioners* at 8. Americold urges that the Tenth Circuit misread *Navarro* because "the trustees of Americold Trust possess virtually the same powers and authority over the Americold trust as did the trustees in *Navarro*." *Id.* But nothing could be further from the truth: the *Navarro* trustees held title to trust property; they were the payees under the notes sued upon; and they sued as natural persons to collect. 446 U.S. at 459-60. Notably, under Massachusetts law the trust had no capacity to bring suit – it must be advanced by the trustees. *See, e.g., Comm'r of Corps. & Taxation v. City of Springfield*, 321 Mass. 31, 43, 71 N.E.2d 593, 600 (1947) ("Other than for the purpose of being sued,

. the trust was not a legal entity." (citing Mass. Gen. Laws ch. 182, §§ 1, 6)).

Obviously, Americold provided no record support that its trustees hold title to all of Americold's property, and more importantly, Maryland REIT trustees are not, and indeed cannot be, parties to this suit. Md. Code Ann., Corps. & Ass'ns § 8-601(b) (trustees generally immune from suit for trust obligations). So, just like *Carden*, there is an artificial entity; it owns property in its name; it's suing or being sued in its own name under state law; and those persons who own beneficial interests in the artificial entity are shareholders or limited partners. Simply stated, Americold's state law status mirrors *Carden*'s limited partnership.

And this Court decidedly stated that *Navarro* provides no guidance to diversity suits where one party is an artificial non-corporate juridical entity. *See Carden*, 494 U.S. at 189-97 The Tenth Circuit recognized as much by correctly addressing *Navarro*'s non-applicability when citing directly to *Carden*:

> As *Carden* makes clear, however, *Navarro* does not support [the] broad proposition [that a trust's citizenship is based on its trustees' citizenship]. Instead, *Navarro* stands for the far more limited proposition that if a trustee is a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries.

ConAgra, 776 F.3d at 1178 (internal citation omitted) (citing *Carden*, 494 U.S. at 188 n.1, 191-92). Simply stated, the Tenth Circuit correctly applied *Navarro* and *Carden*; the court concluded that if trustees sue in their own name, the trustees' citizenship is relevant under *Navarro*. Just as importantly, if a non-corporate artificial juridical entity sues or is being sued, that entity's citizenship must be determined under *Carden*.

Fifth, Americold's insistence that Maryland REITs and other juridical entities be treated differently mangles the common law and stretches it into an unrecognizable form. Americold claims that this Court adheres to a "longstanding approach of looking to the citizenship of those who would have been liable at common law for the obligations of a non-corporate artificial entity." *See Brief for the Petitioners* at 10, 23. But, as stated above, Americold cites no authority, and indeed the cases cited by Americold merely state that the "members" or "the several persons composing [the] association" must be considered for diversity. *Id.* at 24. And, they nowhere state that the justification for this rule is that such members are "persons who would have been liable individually at common law for the entity's obligations." *Id.*

Moreover, such a muddled rule will prove dysfunctional for non-common-law entities. For instance, how does Americold's proposed holding apply to an LLC? There are no persons who would have been liable for an LLC's debts at common law since LLCs did not exist at common law. Does this mean we apply

the *Carden* rule for artificial entities that have no common law ancestry, but for newly-created statutory entities that obliquely resemble some common law institution, we apply a common law liability and real persons in control test? Americold's proposed, unfocused rule remains untethered to the Court's precedent and unworkable for the existing myriad entities which were non-existent at common law. Americold's unending common law contentions are like an ingrown hair that has festered too long. It's time to pluck the infected bristle and relieve the pain. Harmonizing the Court's precedent in light of statutory entities and other non-common-law parties naturally shows that members include those persons with a beneficial economic interest in the entity.[8]

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[8] Several courts have focused on such beneficial owners in the context of manager-managed LLCs. *See Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 121-22 (4th Cir. 2004) (ignoring managers and finding that LLC citizenship depended on members' citizenship); *Morris v. WinCo Foods, LLC*, No. 3:12-CV-01216-ST, 2013 WL 139815, at *2 (D. Or. Jan. 10, 2013) ("For purposes of determining diversity jurisdiction, the analysis depends on the citizenship of WinCo's owners or members, not its managers."); *Meador v. Nashville Shores Holdings, LLC*, No. 3:10-904, 2011 WL 672562, at *2 (M.D. Tenn. Feb. 17, 2011) (rejecting argument that nondiverse, nonmember manager destroyed diversity where members were diverse); *see also Meza v. Lowe's Home Centers, LLC*, No. 15-CV-02320-LHK, 2015 WL 5462053, at *2 (N.D. Cal. Sept. 16, 2015) ("Defendant is a manager-managed LLC with its only member being Lowe's Companies, Inc. Lowe's Companies, Inc., in turn, is a North Carolina corporation with its principal place of business in North Carolina. Accordingly, Defendant is a citizen of North Carolina for purposes of diversity jurisdiction."); *Zavanna, LLC*

(Continued on following page)

D. The claimed harms of indiscriminate forum shopping if this Court maintains its longstanding doctrinal wall are both unfounded and irrelevant.

Americold improvidently warns that if this Court follows its longstanding precedent as applied in *Carden*, it would "invite gamesmanship and forum-shopping" permitting parties to sue either trustee or trust, two parties likely with different diversity citizenship. *Brief for the Petitioners* at 30-31. This position suffers several shortcomings.

First, as this case shows, many plaintiffs have no choice whom to sue, but will simply sue the persons liable under state law. For instance, Maryland REITs are subject to suit, but trustees generally are not liable for REIT obligations, much like corporate directors. Md. Code Ann., Corps. & Ass'ns §§ 8-301(2), 8-601(b). Thus, for numerous Maryland REITs, *see* NAREIT Brief at 3 ("About eighty percent of publicly traded REITs are organized under Maryland law."), a plaintiff faces no choice; it must sue the REIT entity and deal with the diversity consequences.

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v. RoDa Drilling Co., No. 4:09-CV-022, 2009 WL 3720177, at *2 (D.N.D. Nov. 3, 2009) (finding removal notice that provided information about LLC directors and managers was "insufficient to determine [LLC's] citizenship for diversity purposes."); *Ray Brown & Assocs. v. Hot Springs Senior Props., LLC*, No. 8:07CV159, 2008 WL 2271488, at *4 (D. Neb. May 29, 2008) (analyzing whether particular person had ownership in LLC and noting "the L.L.C., like the limited partnership, takes on the citizenship of all those holding equity interests in it").

Second, even if a plaintiff may sue two or more parties with differing citizenship, the plaintiff is the master of its complaint and can "craft" it to destroy diversity. This fact is not inherently objectionable and courts decidedly approve doing so with respect to the amount in controversy:

> Generally, federal courts permit plaintiffs to craft their complaints to avoid federal jurisdiction. . . . [*Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)] ("[F]ederal courts permit individual plaintiffs, who are the masters of their complaints, to avoid removal to federal court, and to obtain remand to state court, by stipulating to amounts at issue that fall below the federal jurisdictional requirement.").

De Jongh v. State Farm Lloyds, 555 F. App'x 435, 437-38 (5th Cir. 2014). Plaintiffs may also use choice of parties to avoid diversity:

> This includes a plaintiff's decision as to which parties to sue. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties."). . . . The district court lacked the authority to disregard [Plaintiff]'s choice to sue Lloyds, not State Farm, and assert diversity jurisdiction.

Id.; *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 & n.25 (1938) ("If he does not

desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove. . . And an amendment in the state court reducing the claim below the jurisdictional amount before removal is perfected is effective to invalidate removal and requires a remand of the cause. "); *Simpson v. Alaska State Comm'n for Human Rights*, 608 F.2d 1171, 1174 (9th Cir. 1979) (nondiverse subsidiary need not be joined as defendant with diverse parent who had accepted liability, although the two arguably shared joint liability).

So, Americold's unfounded forum shopping concerns ignore that Maryland REITs remain unaffected by such concerns because trustees generally can't be sued, but parties suing REITs have no choice but to sue the artificial entity. And even where multiple parties are subject to suit, this Court has long professed that plaintiffs, masters of their complaints, can avoid federal jurisdiction through choosing defendants and limiting amounts in controversy.

E. Maryland REITs' similarities to corporations fail to warrant upending this Court's doctrinal wall between corporations and all other non-corporate juridical entities.

Amicus NAREIT insists that Maryland REITs are functionally similar to corporations requiring placement on that side of the Court's diversity

citizenship doctrinal wall. *See generally* NAREIT Brief. This argument lacks merit for several reasons. *First*, *amicus* notes that corporations and Maryland REITs share certain characteristics: a Maryland REIT is a "separate 'juridical person'; created by state law and given its own 'birth certificate'; liable for its own debts without recourse to the assets of its members; and governed not by its members but by an elected board." NAREIT Brief at 11. Despite *amicus*'s recognition that the Court relied on these characteristics when first raising the doctrinal wall, *amicus* fails to, and indeed cannot, support a claim that REITs must now be placed alongside corporations.

Naturally, if the Court adopts *amicus*'s suggestion, other state law entities also must be placed alongside corporations, likely eliminating the wall altogether. For instance, LLCs as separate legal entities must file articles with the state. *E.g.*, Kan. Stat. Ann. § 17-7673(a), (b). LLC members are not liable to third parties for LLC debts, and managers chosen by the members may manage the LLC. Kan. Stat. Ann. §§ 17-7688, 17-7693. Limited partnerships possess the same characteristics. *See, e.g.*, Kan. Stat. Ann. § 56-1a151 (LP formed by filing certificate with state); § 56-1a203 (limited partners not liable for LP obligations); § 56a-201 (all partnerships are distinct entities[9]); § 56-1a253, § 56-1a255 (general partner or partners operates partnership); § 56-1a251 (general

[9] Kan. Stat. Ann. § 56-1a604 provides that the general partnership law fills in any gaps left by Kansas's limited partnership law.

partners added by consent of all partners or as provided in agreement). Notably, this Court has previously recognized, but nonetheless rejected, these policy concerns, acknowledging that the distinction between corporations and other state law entities is sometimes "technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization." *Carden*, 494 U.S. at 196. Yet, the Court has "firmly resisted extending that treatment to other entities." *Id.* at 189.

Second, *amicus* highlights, ostensibly supporting its insistence that Maryland REITs must be treated as corporations, that in general REITs need not be trusts, but may be corporations. *See* NAREIT Brief at 4 n.2, 16. This alone undercuts *amicus*'s claims: obviously REITs formed as "associations" are distinct from corporations under Maryland statutes which recognize REITs both as "unincorporated business trust[s] or association[s]" and corporations, giving organizers entity choices much like choosing an LLC, limited partnership, or corporation. In short, federal courts evaluating diversity need only determine a REIT's corporate status and apply *Carden*; muddying the waters with threshold jurisdictional litigation analyzing which artificial entities most resemble corporations and should be treated as such serves no transcending purposes justifying the long-suffering judicial efforts doubtlessly necessary to conduct such litigation.

Third, the fact that Maryland REITs may choose to be corporations eviscerates the policy argument that non-corporate REITs need the protection offered by federal courts sitting in diversity. *See* NAREIT Brief at 5, 10. By *amicus*'s admission, Maryland REIT organizers may choose corporation or an unincorporated entity status, triggering certain consequences, including tax effects. NAREIT Brief at 4 n.2, 16. But, this choice also, just like choosing to incorporate or form an LLC, has diversity jurisdiction consequences. Maryland REITs wishing to make federal court access in diversity more likely need only incorporate.

So, Congress need not expand diversity jurisdiction providing additional federal court access to Maryland REITs. NAREIT Brief at 31. Instead, a Maryland REIT need only choose corporation status to increase diversity likelihood. Md. Code Ann., Corps. & Ass'ns §§ 8-501.1(b) (Maryland REIT can merge into corporation), 8-701(b) (Maryland REIT can convert to corporation). And would-be investors can simply choose REIT corporations, rather than REIT trusts or associations, if they wish to increase their investment vehicles' chances of federal diversity jurisdiction.

Finally, as *amicus* highlights, "the majority of publicly traded REITs are organized under state law as corporations," and after Congress amended REIT tax law to allow corporations, "REITs gradually began to migrate to Maryland corporations (or occasionally Delaware corporations, or other business forms for state and local tax reasons)." NAREIT Brief at 4 n.2,

16. If this is so, NAREIT's claims regarding federal court access ring hollow at best.

In sum, this Court need not breach its long-standing doctrinal wall to afford a few Maryland REITs access to federal courts because they claim to be otherwise defenseless to state court vagaries. Maryland REITs choosing not to incorporate, or merge into corporations, pass on such protection.

II. Even if Americold's citizenship is determined by the trustees' citizenship as urged, Americold failed to establish diversity jurisdiction.

A. Flawed diversity jurisdiction invalidates any final judgment where indispensable parties are not completely diverse at the time judgment is entered. Here, the Americold trustees never established complete diversity between themselves and the Tenant Plaintiffs at the time judgment was entered. Thus, Americold's claim that the trustees' citizenship determines the entity's citizenship leads only to remand.

District court judgments in removed diversity jurisdiction cases must be vacated where indispensable, nondiverse parties remain at the time of

judgment.[10] *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16 (1951). In other words, incomplete diversity at removal is not fatal where there is "complete diversity, and therefore federal subject-matter jurisdiction, at the time of trial and judgment." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996). But where the jurisdictional defect remains uncured, "linger[ing] through judgment in the District Court," the judgment must be vacated. *See id.* at 76-77 ("[I]f, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated."); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Here, even accepting *arguendo* Petitioners' claim that Americold's citizenship must be determined by the trustees' citizenship, federal subject matter jurisdiction simply never existed. That is, at removal, Americold trustees were citizens of California and Massachusetts. *See* Pet. App. at 51. And, on the other side of the diversity ledger, Plaintiffs Safeway and

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[10] Appellants initially suggested to the Tenth Circuit that if it found diversity jurisdiction lacking due to Safeway's and Kraft's citizenship, such parties should have been dismissed as dispensable, nondiverse parties. Appellants now realize they took that position improvidently, even perhaps hastily, because hopes that a merits decision shortening Appellants' "journey of a thousand miles" impeded Appellants' legal analysis. However, after opportunity for a more thorough review, Respondents believe the pertinent authorities cited herein dictate Safeway and Kraft are not dispensable, nondiverse parties to which *Newman-Green* applies.

Hanover were also California and Massachusetts citizens. J.A. at 23. This diversity defect remained "[un]cured" – it "lingered through judgment." *Cf. Caterpillar*, 519 U.S. at 77 Naturally, this requires remand even if the Americold trustees' citizenship is determinative for diversity purposes.

B. The limited diversity exception recognized in *Newman-Green* is inapplicable here. Remand is required.

Petitioners urge this Court to sift the record piecing together subject matter jurisdiction on appeal by recognizing their trustee-only-diversity-citizenship rule. Yet Petitioners ignore the fact that there is no diversity even under Petitioners' urged trustees test. Indeed, Petitioners obliquely reference this by claiming that because Kraft and Safeway did not appeal the District Court's merits judgment, they should be ignored. *Brief for the Petitioners* at 5 n.2.

Despite Petitioners' claims, a party's choice not to appeal in no way retroactively cures subject matter jurisdiction defects. *Newman-Green* provides no stronghold for Americold in that the plaintiffs there initially filed suit in federal district court against multiple defendants based on diversity jurisdiction, and while on appeal, the Seventh Circuit uncovered a defendant's citizenship which "destroyed complete diversity." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828-29 (1989). The plaintiff filed an agreed-to motion to dismiss the nondiverse

defendant, but the *en banc* court held that fatal subject matter jurisdiction wounds can't be healed by dismissing the nondiverse defendant in the court of appeals. *Newman-Green, Inc. v. Alfonzo-Larrain*, 854 F.2d 916 (7th Cir. 1988) (*en banc*).

This Court reversed, holding that courts of appeals (like district courts) have the authority to cure a jurisdictional defect "by dismissing a dispensable nondiverse party," but emphasizing that "such authority should be exercised sparingly" so as to "carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." *Newman-Green*, 490 U.S. at 837-38. The Court concluded that granting the plaintiff's agreed-to motion to dismiss the nondiverse defendant was appropriate because the parties suffered no harm. *Id.* at 838.

But, Kraft and Safeway occupy much different positions than the *Newman-Green* dispensable defendant because they have exercised rights to permissively join as plaintiffs. Indeed, their claims and Respondents' claims involve the same transaction or occurrence and same legal and factual questions. Fed. R. Civ. P. 20(a). In other words, Kraft and Safeway are not "misjoin[ed]." They are indispensable and unable to be dropped under Fed. R. Civ. P. 21.

Moreover, unlike *Newman-Green*, Kraft and Safeway never requested their claims be dismissed or severed. Instead, Petitioners request that this Court ignore Kraft's and Safeway's claims existing at the

time of judgment to now create diversity jurisdiction on appeal. Indeed, lower courts have refused to extend *Newman-Green* by permitting defendants to dismiss nondiverse plaintiffs in order to retain jurisdiction. *Curry v. U.S. Bulk Transp., Inc.*, 462 F.3d 536, 542 (6th Cir. 2006); *Baker v. Tri-Nations Express, Inc.*, 531 F. Supp. 2d 1307, 1317 (M.D. Ala. 2008) ("While several courts have used *Newman-Green* and their discretion under Rule 21 to drop dispensable defendants and thus preserve subject matter jurisdiction, '[n]one of these cases, however, support dropping a nondiverse plaintiff, over the plaintiff's objection, in order to retain (or create) subject matter jurisdiction.'" (quoting *Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285, 1289 (M.D. Fla. 2002))).

For example, in *Curry*, the Sixth Circuit rejected a defendant's proposed *Newman-Green* extension to rescue diversity by dismissing a plaintiff's claim in a case removed from state court. 462 F.3d at 542. According to the court, *Newman-Green* involved "fundamentally different" circumstances. *Id.* "*Newman-Green* did not involve removal" and, thus, "it was the plaintiff [ ] who wished to be in federal court all along [and] who sought to dismiss the nondiverse defendant." *Id.* The *Curry* court noted that, if a plaintiff's claims against nondiverse defendants were dismissed, the plaintiff would be forced to expend further resources initiating a second lawsuit in state court that would otherwise be unnecessary. *Id.* This "two-suit resolution," the Court found, results in "an utter waste of judicial resources," and as such, the

court remanded the action "in its entirety." *Id.* at 542-43.

Here, Kraft and Safeway chose state court, but Petitioners removed claiming diversity jurisdiction. Unlike *Newman-Green*, Kraft and Safeway are not requesting their claims be dismissed to preserve diversity. In *Newman-Green*, "the triggering factor for the appellate authority to dismiss the nondiverse defendants to cure the lack of jurisdiction was the *plaintiff's* motion to enable it to proceed with the case against diverse defendants in federal court." *Curry*, 462 F.3d at 543 (emphasis in original). Furthermore, dismissing Kraft and Safeway to resurrect diversity jurisdiction forces those parties to re-file their claims in state court. This "two-suit resolution" results in a waste of judicial and party resources.

Finally, any alternative suggestion that Kraft's and Safeway's claims should be "severed" under Rule 21 is as unworkable as it is unsupported. Permitting defendants to create federal diversity jurisdiction by severing nondiverse plaintiffs' claims will flood federal courts with new diversity cases. And, as here, the nondiverse plaintiffs' claims often arise out of the same transaction or occurrence and involve the same legal and factual questions. *See* Fed. R. Civ. P. 20(a)(1). The nondiverse plaintiffs' claims should not be permitted to proceed on a dual track – likely resulting in clashing state court and federal court rulings – just to establish diversity jurisdiction.

Thus, even if Americold's citizenship is measured only by its trustees' citizenship, federal diversity jurisdiction never existed at the time of the judgment. Any efforts to raise such jurisdiction from the dead are without authority under the federal rules.

CONCLUSION

This step in the thousand-mile journey must ignominiously end with remand to state court, in that diversity must be measured by Americold's beneficial owners nominally called shareholders under Maryland law and not its board of managers called trustees. Americold invoked diversity jurisdiction as a non-corporate Maryland artificial entity possessing capacity to sue and be sued, and as such, its citizenship must be measured by aggregating all of its shareholders' citizenship, thus making Americold a citizen of every state its shareholders are citizens.

Maryland REITs, like limited partnerships and limited liability companies, can't be morphed into something they are not by simply drawing an analogy between common law trust beneficiaries' limited liability and the limited liability of the REIT's, limited partnership's, or limited liability company's beneficial owners. To do so ignores the decided and instinctive differences between common law trusts and those artificial entity associations. This Court erected a doctrinal wall for artificial entities with only two sides, and Americold's strained efforts to

climb over to the corporation side, or erect yet another wall somehow segregating non-corporate associations into further sub-classifications is unavailing.

Thus, for the foregoing reasons, Respondents request this court affirm the decision of the Tenth Circuit and hold that state law artificial non-corporate juridical entities' citizenship is measured by aggregating the citizenship of the entities' beneficial owners, and likewise affirming the Tenth Circuit's order remanding the case to state court.

Respectfully submitted,

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